

Blue Ridge Environmental Defense League

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August 15, 2017

Mark R. Herring, Attorney General
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219

RE: Complaint–Failure to require individual permits for pipeline crossings

Dear Mr. Herring:

On behalf of the Blue Ridge Environmental Defense League and our chapters in Virginia, I hereby file a formal complaint that the Virginia Department of Environmental Quality is in violation of state water quality statutes. In order to come into compliance, Virginia DEQ must permit each stream and waterbody crossing individually, not collectively. Our review of statutes, rules and jurisprudence indicates that the site-specific permitting process for natural gas pipelines is a preferable, necessary and prudent means of protecting water quality which complies with both federal and state law. Moreover, failure to comply would result in degradation of the environment and adverse impacts on public health. The relief we seek is individual permitting.

Pipeline Impacts

The proposed Atlantic Coast Pipeline (and Supply Header Project, or SHP), if approved and constructed, would deliver up to 1.5 billion cubic feet per day (Bcf/d) of natural gas. ACP would construct and operate 333 miles of 42-inch-diameter mainline pipeline, 186 miles of 36-inch-diameter mainline pipeline, and 83 miles of 20-inch diameter lateral pipeline, plus compressor stations and other facilities. The pipeline would cross 71 miles of fragile and unstable karst terrain—prone to sinkholes, caves and springs—and 84 miles of slopes greater than 20 percent grade—creating potential for landslides. According to the Federal Energy Regulatory Commission:

There are 1,669 waterbody crossings on ACP and SHP (including access roads), including 702 perennial, 642 intermittent, 228 ephemeral, 49 canals/ditches, and 48 open water ponds/reservoirs.... Construction of ACP and SHP would temporarily affect 798 acres of wetland and operation would affect 244 acres of wetland... Operation of ACP and SHP would have long-term to permanent effects on about 3,456 acres of vegetation, including about 2,744 acres of upland forest vegetation (deciduous, coniferous, and mixed).¹

The proposed Mountain Valley Pipeline, if approved and constructed, would deliver up to 2.0 billion cubic feet per day (Bcf/d) of natural gas. MVP would construct and operate 303 miles of 42-inch-diameter mainline pipeline, plus compressor stations and other facilities. About 97 miles of the MVP route would cross slopes greater than 15 percent grade and cross 67 miles of fragile and unstable karst terrain—prone to sinkholes, caves and springs. According to FERC:

¹ FERC/EIS-0274F, Docket Nos. CP15-554-000, CP15-554-001, CP15-555-000, and CP15-556-000 (July 2017)

Construction of the MVP would disturb about 5,053 acres of soils that are classified as having the potential for severe water erosion...construction of the MVP would disturb about 2,829 acres of prime farmland...traverse about 216 miles of shallow bedrock...would result in 1,108 waterbody crossings....²

Together, the amount of land area that would be disturbed or permanently impacted by the ACP and MVP would be over 10,000 acres and the number of waterbody crossings totals over 2,700. Severe siltation of streams is likely. According to Virginia erosion and sedimentation data:

The typical construction site erodes at a rate of 100,000 tons per square mile per year. This rate is 200 times greater than erosion from cropland and 2000 times greater than erosion from woodland.³

At this rate, something like a billion tons of soil per year would be eroded, washed away, during construction years and could continue for an unknown number of subsequent operation years.

Federal Law

As you know, the federal Clean Water Act sets the minimum standards for Virginia regulation and permitting affecting water quality. Clean Water Act Section 401 is triggered when “any license or permit granted by an agency of the Federal Government to conduct any activity which may result in any discharge into ...waters of the United States.”⁴ In a decision supporting a state environmental agency over the Federal Energy Regulatory Commission in a licensing action, the US Supreme Court held:

State certifications under § 401 are essential in the scheme to preserve state authority to address the broad range of pollution....These are the very reasons that Congress provided the States with power to enforce ‘any other appropriate requirement of State law,’ 33 U.S.C. § 1341(d),⁵

In its decision, the Court cited the legislative intent of § 401:

No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.⁶

The Clean Water Act is an effective and welcome environmental law. However, the federal Act is not a substitute for individual state water quality regulations. US Environmental Protection

² FERC/FEIS-0272F, FERC Docket Nos. CP16-10-000 and CP16-13-000 (June 2017)

³ *Virginia Erosion and Sediment Control Handbook*, Third Edition, 1992, Chapter 1 at I-1

⁴ 40 CFR § 121.1(a)

⁵ *S.D. Warren Co. v. Maine Board of Environmental Protection et al*, 547 U.S. 370, 126 S.Ct. 1843 (2006).

⁶ 116 Cong. Rec. 8984 (1970).

Agency guidance states that comprehensive state programs are necessary to ensure that water quality conditions not covered by the federal law are also protected.

State Law

In the Commonwealth of Virginia, state environmental regulations are found at Title 9 of the Virginia Administrative Code; Chapter 840 governs erosion and sediment control.⁷

Virginia Water Protection permitting includes Section 401 certification for disturbing a wetland or stream. State law requires that a VWP permit be obtained before disturbing a wetland or stream by clearing, filling, excavating, draining, or ditching. VWP permits may also require DEQ approved compensation for wetland and stream impacts prior to disturbance activities.

Under state statutes and regulations, Virginia must assume direct authority over interstate pipeline construction. For example, Virginia law “sets forth minimum standards for the effective control of soil erosion, sediment deposition, and nonagricultural runoff that must be met:

3. In annual general erosion and sediment control standards and specifications that electric, natural gas, and telephone utility companies, interstate and intrastate natural gas pipeline companies, and railroad companies are required to file, and authorities created pursuant to § 15.2-5102 of the Code of Virginia may file with the department pursuant to § 2.1-44.15:55 D of the Act;⁸
[emphases added]

Therefore, under the Code of Virginia, interstate natural gas pipeline companies are required to submit erosion and sediment control standards and specifications to the DEQ pursuant to the state’s Erosion and Sediment Control Act.

Further, the Virginia Erosion and Sediment Control Program regulations at 9VAC25-850 define the manner in which state and local governments are to regulate, permit, monitor and enforce water quality standards:

“Virginia Erosion and Sediment Control Program” or “VЕСP” means a program approved by the board that has been established by a VЕСP authority for the effective control of soil erosion, sediment deposition, and nonagricultural runoff associated with a land-disturbing activity to prevent the unreasonable degradation of properties, stream channels, waters, and other natural resources and shall include such items where applicable as local ordinances, rules, permit requirements, annual standards and specifications, policies and guidelines, technical materials, and requirements for plan review, inspection, enforcement where authorized in the ESC Act and this chapter, and evaluation consistent with the requirements of the ESC Act and this chapter.

“Virginia Erosion and Sediment Control Program authority” or “VЕСP authority” means an authority approved by the board to operate a Virginia Erosion and Sediment

⁷ “The Act” refers to Virginia’s Erosion and Sediment Control Law, Article 2.4 (§ 62.1-44.15:51 et seq.) of Chapter 3.1 of Title 62.1 of the Code of Virginia

⁸ 9VAC25-840-30 Scope and Applicability

Control Program. An authority may include a state entity, including the department; a federal entity; a district, county, city, or town; or for linear projects subject to annual standards and specifications, electric, natural gas and telephone utility companies, interstate and intrastate natural gas pipeline companies, railroad companies, or authorities created pursuant to § 15.2-5102 of the Code of Virginia.⁹ [emphases added]

However, nowhere in these regulations is there an exemption from the law or a permitted non-compliance based on a lack of adequate state staff or resources.

Virginia also has a VWP General Permit WP2, which can apply to facilities such as interstate natural gas pipelines, but is not adequate for the ACP or MVP projects. See General Permit WP2 at 9VAC25-670-100. The VWP General Permit states, *inter alia*, “In issuing this VWP general permit, the board has not taken into consideration the structural stability of any proposed activities.” This provision is for minor projects, not interstate pipelines. In view of the severe conditions exposed in the Final EIS for the two projects—karst, sinkholes, landslides etc.—the State Water Control Board’s general permit is clearly unsuitable.

Moreover, the magnitude of the pipeline projects clearly does not fit within the limits of the general permit scheme. VWP General Permit Part I.A.1 Special Conditions states:

“The activities authorized by this chapter shall not cause more than the permanent or temporary impacts of up to one acre of nontidal wetlands or open water and up to 1,500 linear feet of nontidal stream bed.
[emphasis added]

With thousands of stream crossings apiece, the linear foot threshold is exceeded many times over.

Finally, the federal Clean Water Act delegates to states the power to grant or deny water quality certification under Section 401. In fact, federal approval cannot proceed without state certification; state authority to veto federally-permitted projects is derived from § 401 of the Clean Water Act, and has been utilized to halt natural gas pipelines which fail to meet state standards.

Environmental Justice

Virginia law governing energy development articulates support for environmental justice and equitable development. One of the stated objectives in Commonwealth Energy Policy is “developing energy resources and facilities in a manner that does not impose a disproportionate adverse impact on economically disadvantaged or minority communities.” VAC § 67-101 (12). Further, it states that “To achieve the objectives enumerated in § 67-101, it shall be the policy of the Commonwealth to [e]nsure that development of new, or expansion of existing, energy resources or facilities does not have a disproportionate adverse impact on economically disadvantaged or minority communities.” VAC § 67-102 (A)(11).

⁹ Erosion and Sediment Control and Stormwater Management Certification Regulations 9VAC25-850 (Effective 10/23/2013) (updated on January 4, 2017) Page 6 of 158

Of the eleven jurisdictions which would have the 42-inch section of the proposed ACP, seven have above average percentages of African American populations: Buckingham, 35%; Brunswick, 55.2%; Cumberland, 32%; Dinwiddie, 32.5%, Greenville, 59.4%; Nottoway, 39.9%; Prince Edward, 32.4%. Virginia's African-American population percentage is 19.7%. Eight of the jurisdictions have higher than average poverty percentages: Buckingham 20.2%; Brunswick, 22.1%; Cumberland 19.6%; Greenville, 27.9%; Highland, 13.8%; Nelson, 13.9%; Nottoway, 23.7%, and Prince Edward, 22.3%. Virginia's poverty rate is 11.2%. All eleven jurisdictions have home values well below the state average of \$245,000, with the lowest found in Greenville County at \$99,800, Brunswick County at \$105,200 and Buckingham County at \$131,800.

A fatal flaw we have identified in FERC's recently issued Environmental Impact Statement is the complete disregard of the Union Hill/Union Grove community. We believe it imperative to recognize the cultural and historical significance of this community. It is a community created during Reconstruction by freed slaves. Many descendants of those freed slaves still live today in Union Hill/Union Grove. Over 90% of adjoining land is owned today by African-American families. These families have lived, worked and raised their children in the Union Hill community. The siting of the compressor station and the ACP pipeline it serves is an environmental racism issue which can and must be fully identified and remedied under Virginia law.

Conclusion

Clearly, state law must be the concern of the state. Based on the factors outlined above, we believe the only acceptable course for the Department of Environmental Quality and the State Water Control Board is to ensure that Virginia law is applied in this matter. Moreover, we believe that the pipeline projects, when properly and fully considered, will be found insufficient for approval by the Commonwealth of Virginia.

Thank you. I look forward to your reply.

Respectfully,

A handwritten signature in black ink, appearing to read "Louis A. Zeller", followed by a horizontal line extending to the right.

Louis A. Zeller
Executive Director